84-72

No. .....

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

RAYMOND C. BLIM, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred in refusing to evaluate proferred statistical evidence under the *Hazelwood-Castaneda* standards because the case was tried to a jury rather than to the court alone.

2. Whether a jury in a case alleging individual disparate treatment based on age discrimination may properly be instructed that statistical evidence alone can be determinative of the ultimate issue of discriminatory intent.

3. Whether the judgment and opinion of the court of appeals should be vacated because of the court's failure to consider and rectify an error in jury instructions on the burden of proof under the Age Discrimination in Employment Act which reversed the role of the jury and judge and affected the substantial rights of the parties.

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AT&T TECHNOLOGIES, INC.,

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RAYMOND C. BLIM, MORRIS E. KINGHORN, J. F. VUKASOVIC, RALPH V. OLDHAM, STANLEY L. BOARTS, EUGENE FIRESTONE, WALLACE S. REPETTO, and LARRY N. STEWART,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner AT&T Technologies, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 3, 1984.

OPINIONS BELOW

The majority and concurring and dissenting opinions of the Court of Appeals (Pet. App. A) are reported at 731 F.2d 1473 (10th Cir. 1984); the Order of the Court of Appeals denying en banc rehearing (Pet. App. C) is not yet published. The opinion of the United States District Court for the Western District of Oklahoma (Pet. App. B) is reported at 496 F. Supp. 818 (W.D. Okla. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered April 3, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on May 8, 1984. On June 20, 1984 the Tenth Circuit stayed its mandate pending filing of a petition for certiorari on or before July 16, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE

The statute involved is the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

STATEMENT OF THE CASE

On September 8, 1978, eight employees of AT&T Technologies, Inc.'s ("AT&T-TI's") Oklahoma City works[1] brought this action under the ADEA alleging that AT&T-TI had failed to repromote them to section chief positions because of age. The eight plaintiffs were former section chiefs who had been demoted to non-supervisory positions during a reduction in force in 1974 and 1975.

Following a jury trial in March 1980 limited to the issue of liability a jury verdict was entered in favor of each individual plaintiff on the repromotion claims. A second trial on damages was held before the district court sitting without a jury, and on September 5, 1980, the court entered judgment against AT&T-TI in the amount of $901,440.78.[2]

Both parties offered statistical evidence at trial analyzing

[1] When the complaint was filed, the Oklahoma City plant was owned by Western Electric Co., Inc. Western Electric's name was changed to AT&T Technologies, Inc. in 1984.

[2] The award included front pay, back pay, a lump sum annuity for social security losses, damages for lost purchasing power on

promotions of employees in the age group protected by the ADEA. The plaintiffs' expert, Heyward P. White, presented two sets of exhibits. In the first, he argued that AT&T-TI's performance appraisals were biased by age. Although the exhibits did not show on their face results of any statistical testing, White testified he had applied a statistical analysis called the "goodness of fit" test from which he concluded that considering 1975 appraisals by age, ninety-seven percent of the time a closer fit to uniform distribution would be expected. (J.A. 647).[3] Based on this conclusion, White testified to the jury that he "was 97 percent certain that the appraisal ratings were not distributed without regard to age." (J.A. 633, 648).

In the second group of exhibits, White purported to show a relationship between age and repromotion. He limited his analysis to repromotions of former section chiefs, thereby excluding 69 of the 101 promotion decisions made during the relevant period for which former section chiefs, including plaintiffs, were in competition. Applying a "goodness of fit" and probability test to the thirty-two decisions which he considered, White testified that based on a probability statistic of ninety-nine percent, he was able to conclude with "(a)bout 99 percent certainty" that younger employees had received preference in promotions. (J.A. 657).

AT&T-TI presented uncontradicted evidence that, applying both a .05 probability standard and a standard deviation analysis to all the 101 promotion decisions during the relevant period, none of the promotion figures showed selection

back wages, damages for payment of additional income taxes on the award, liquidated damages in an amount equal to each of the enumerated items of damages, and $175,000 in attorneys' fees.

[3] "J.A." references are to pages of the Joint Appendix filed in the Court of Appeals. "E." references are to the volume of the Joint Appendix containing exhibits.

rates based on age within statistically significant ranges. AT&T-TI also presented raw data showing that during the 1974-1979 period in which promotion decisions were challenged, the number of section chiefs aged thirty-nine and under declined by half, from 124 to 62, while their percentage of the section chief group declined from 43.5% to 26.6%. (E. 177). During the same period, section chiefs aged forty and over increased in absolute numbers from 161 to 171 and in percentage representation from 56.5% of the total to 73.4%. (E. 177).

In closing argument, plaintiffs' counsel argued to the jury that while AT&T-TI's statistician might not infer bias from a probability of a chance occurrence greater than five percent, the jury was entitled to do so. (J.A. 1072).[4] In reference to the expressions of "certainty" of the plaintiffs' expert, counsel told the jury, "You just couldn't explain a 97 or so per cent certainty when you look at those figures if it wasn't willful age discrimination." (J.A. 1133).

The trial court overruled AT&T-TI's objections to the plaintiffs' statistical evidence, and in submitting the case to the jury, refused AT&T-TI's requested instructions setting forth legal standards to be used by the trier of fact in weighing statistical evidence. Instead, the court gave only a general instruction on the weight to be accorded expert testimony. In a separate instruction, however, the court charged the jury that statistical evidence could establish the ultimate fact in issue.[5]

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[4] Referring to a probability statistic of 84% plaintiffs' counsel argued that "only sixteen out of a hundred times would you get the kind of age discrimination on promotions." (J.A. 1072). Later he stated, "It seems to me that 97 percent certainly is pretty persuasive." (J.A. 1091).

[5] In reference to indirect evidence of discrimination, the judge advised the jury that "Other evidence, *including statistical evidence,* can establish these elements, *as well as the ultimate issue,* if the

The plaintiffs' claims were tried as individual disparate treatment cases, and in formulating its instructions to the jury, the trial court accordingly applied the standards on burden of proof set forth in *McDonnell-Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). The trial judge intended to charge the jury that he had determined that AT&T-TI had satisfied its burden of articulating legitimate reasons for the promotion decisions in question, the issue for the jury being whether plaintiffs had carried their ultimate burden by proving pretext. (J.A. 102). In reading the charge to the jury, however, the judge misread the instruction, stating instead that "It is for the *jury* in this case to determine whether defendant has stated a legitimate reason. . . ." (emphasis added). (J.A. 1149).

Prior to retirement of the jury, the error was brought to the trial judge's attention and exception taken by AT&T-TI's counsel. The trial judge's response was an apparent reference to the jury's possession of a copy of the instructions in the jury room: "Well, they are going to have these with them and if they need them it will clear it up." (J.A. 1157). The jury was never read the correct instruction nor was it advised that an error had been made.

AT&T-TI timely filed an alternative motion for judgment notwithstanding the verdict or for new trial, in which it argued that a new trial was warranted on numerous grounds, including admission of improper and prejudicial statistical evidence and expert testimony, plaintiffs' counsel's closing argument, and errors in the jury instructions. The motion was overruled without opinion.

AT&T-TI noted its appeal on September 12, 1980. Briefs were timely filed, and oral argument was heard by a panel

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jury believes that it shows that a plaintiff was not repromoted because of his age." (emphasis added.)

of the Tenth Circuit on October 1, 1981. On June 13, 1983, on its own motion and without explanation, the court vacated the oral argument and submission of the case. A second oral argument was heard on August 3, 1983. The court's opinion affirming the jury verdict on liability and reversing in part the damages and fee awards issued on April 3, 1984. Chief Judge Seth filed a separate concurring and dissenting opinion criticizing the majority opinion's failure to decide that front pay is an impermissble remedy under the ADEA.

AT&T-TI contended on appeal that the plaintiffs' expert testimony was not probative under the standards set forth in controlling decisions of this Court and prejudicially misstated the conclusions properly deducible from statistical analysis. The majority opinion did not reach the merits of these contentions, holding only that "Whether the evidence supported the plaintiffs' statistical conclusions and what weight should be accorded to those statistics are issues for the jury." 731 F.2d at 1477. Similarly, the district court's failure to instruct the jury on standards for consideration of statistical evidence and the misreading of the charge were not discussed. The opinion treated all issues relating to jury instructions in one sentence: "The standards were followed by the trial court and the trial court correctly instructed the jury." 731 F.2d at 1477.

AT&T-TI filed a timely petition for rehearing and suggestion for rehearing en banc, noting the omission of any discussion in the opinion of issues which had been expressly raised as grounds for appeal, including those relating to the statistical evidence and the jury instructions. The Petition was denied without discussion of these issues on May 8, 1984.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts in Principle With the Decisions of this Court and other Courts of Appeals Setting Forth Guidelines for the Consideration of Statistical Evidence in Employment Discrimination Cases.

Under the decision of the Court of Appeals, a jury is free to consider statistical evidence which does not satisfy minimal standards of probative value established in employment discrimination cases and to base its ultimate finding of discriminatory intent on such evidence alone. This result is irreconcilable with the principles set forth in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and with the body of law developed in the lower courts governing the evaluation of statistical evidence. The Court of Appeals' justification for its decision, that the jury is to decide both the weight to be accorded to statistical evidence and whether an expert's conclusions have evidentiary support, would render *Hazelwood* a nullity whenever an employment discrimination case is tried to a jury rather than to a judge.

A. In *Hazelwood*, a Title VII[6] action alleging a pattern and practice of racial discrimination, this Court held that the statistical comparison employed by the district court, which compared Hazelwood's teacher work force to its student population, "fundamentally misconceived the role of statistics in employment discrimination cases." 433 U.S. at 307. The proper comparison was between the teaching staff and the qualified teacher population in the relevant labor market. Because the district court had not adequately considered factors determinative of the relevant labor market, the case was remanded for further findings. "And

[6] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial discrimination in its employment practices in violation of the law." *Id.* at 312-13.

In reliance upon *Castaneda* v. *Partida,* 430 U.S. 482, 496 (1977), the Court in *Hazelwood* also approved the use of a standard deviation analysis as a precise method of measuring the significance of statistical disparities. 433 U.S. at 309, n. 14. As a general rule, where large samples are concerned, if the difference between the expected value and the observed number is greater than two or three standard deviations, the null hypothesis that race was not considered would be suspect. 433 U.S. at 307.

Hazelwood's emphasis on an appropriate comparison, on a factually supportable determination of the relevant labor pool, and on a proper methodology for evaluating statistical disparities has been echoed in subsequent decisions by the courts of appeals. The courts have been careful to require that an expert's selection of the number of decisions subjected to statistical analysis be based upon a sufficient factual foundation and not be arbitrarily limited "to obtain a desired result," *EEOC* v. *Federal Reserve Bank of Richmond,* 698 F.2d 633, 649-50 (4th Cir. 1983), *rev'd. on other grounds, sub nom. Cooper* v. *Federal Reserve Bank of Richmond,* —— U.S. ——, 35 F.E.P. Cases 1 (1984); that the statistical evidence present proper comparisons and be based on appropriate pools and samples, *Pace* v. *Southern Ry.,* 701 F.2d 1383 (11th Cir.), *cert. denied,* 104 S.Ct. 549 (1983); *Stendebach* v. *C.P.C. International, Inc.,* 691 F.2d 735 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 2122 (1983); and, absent disparities egregious on their face (e.g., the "inexorable zero"), that a claim either of a "marked disproportion" or a "gross disparity" be supported by a demonstration of statistical significance un-

der the *Hazelwood-Castaneda* guidelines or some other recognized statistical methodology. *EEOC* v. *Federal Reserve Bank of Richmond*, 698 F.2d at 648; *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 535 (5th Cir. 1982).

Each of these principles was ignored by the court below out of an excessive deference to the jury's role in weighing the evidence. Moreover, because of the court's erroneous view of the role of judge and jury, it also permitted expert testimony which grossly exceeded the boundaries dictated by statistical analysis. Where evidence indicates statistically significant results, the determination of legal significance remains an issue for the fact-finder and not the expert witness. *EEOC* v. *Federal Reserve Bank of Richmond*, 698 F.2d at 648. Most importantly, rebuttal of the null hypothesis does not in and of itself demonstrate discriminatory intent: "Simply put, statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer's conduct." *Gay* v. *Waiters Union, Local 30*, 694 F.2d 531, 553 (9th Cir. 1982).

The court's holding that it is for the jury to determine if the evidence supported the plaintiffs' statistical conclusions is in addition error as a matter of law. It is the responsibility of the trial judge in the first instance to insure that an expert's conclusions have evidentiary support, and if they do not, to exclude them or to submit them under a limiting instruction. *United States* v. *Sowards*, 370 F.2d 87, 92 (10th Cir. 1966); *Herman Schwabe, Inc.* v. *United Shoe Manufacturing Corp.*, 297 F.2d 906, 912 (2nd Cir. 1962), *cert. denied*, 369 U.S. 865 (1962); *Fed R. Evid.* 703. The requirement of a sufficient factual foundation for the admission of expert testimony applies to statistical evidence in employment discrimination cases as in any other area of the law. *EEOC* v. *Federal Reserve Bank, supra; Garcia* v.

Rush Presbyterian-St. Luke's Medical Center, 660 F.2d 1217 (7th Cir. 1981); *Cooper* v. *University of Texas at Dallas*, 648 F.2d 1039 (5th Cir. 1981).

The federal courts have long recognized the trial court's special responsibility "to scrutinize most carefully unusually technical or complicated expert testimony" presented to a jury. *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 999-1000 (5th Cir. 1976).

> The District Court must do more than merely weigh the probative value of an expert's testimony considered as a whole. Where practical, a trial judge should exclude particular assumptions or other aspects of an expert's testimony which considered individually do not meet the "minimum of probative value." *Herman Schwabe, Inc.* v. *United Shoe Manufacturing Corp., supra*, 297 F.2d at 912. This more detailed scrutiny is necessary because some telling errors may become virtually unreviewable once the jury has returned its verdict.

Id. Accord, Construction Aggregate Transport, Inc. v. *Florida Rock Industries, Inc.*, 710 F.2d 752, 789 (11th Cir. 1983); *Hunziker* v. *Scheidemantle*, 543 F.2d 489, 498 (3rd Cir. 1976); *Washington Hospital Center* v. *Butler*, 384 F.2d 331, 335 (D.C. Cir. 1967); *Herman Schwabe, Inc.* v. *United Shoe Manufacturing Corp., supra* at 912. *See also, Geller* v. *Markam*, 635 F.2d 1027, 1033-34 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (upholding exclusion of statistical evidence from the jury in a trial under the ADEA).

Failure to subject statistical evidence in this case to a "more detailed scrutiny" led directly to the jury's consideration of evidence lacking in minimal probative value. The plaintiffs' expert was allowed to testify concerning an

analysis based on less than a third of the actual number of decisions in issue, and to advise the jury that his probability findings based on that limited analysis, rather than merely rejecting the null hypothesis, amounted to mathematical certainties that discrimination had occurred.

Such testimony was a distortion of the conclusions properly reachable through statistical analysis and grossly overreached the bounds of proper expert testimony. Rule 703, Fed. R. Evid.[7] Had this case been tried to the court alone, the district judge would not have been free to disregard the standards of *Hazelwood* and subsequent decisions by reliance on such evidence. The court cannot abandon these standards simply because the case is tried to a jury. Indeed, greater safeguards are warranted because of the often confusing and, as here, misleading nature of statistical evidence. *See Haddad* v. *Lockheed California Corp.*, 720 F.2d 1454 (9th Cir. 1983).

B. The error resulting from failure to apply the *Hazelwood* standards to the evaluation of the statistical evidence was compounded by the jury instructions.

Because this case concerned individual claims that AT&T-TI had failed to promote each plaintiff because of his age, plaintiffs were required to prove intentional discrimination in order to prevail. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).[8] Direct evidence of discriminatory intent is not

[7] *Fed. R. Evid*, 703 requires that the facts or data relied on by an expert be "of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject." Where the grounds are not reasonably reliable, the court may exclude the testimony under this rule. *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977).

[8] The Tenth Circuit has expressly held that the standards of proof in Title VII disparate treatment cases are applicable to claims under

necessary; as in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. *United States Postal Service Board of Governors* v. *Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 1481, n. 3 (1983).

The use of statistics as circumstantial evidence in disparate treatment cases presents unique problems. Statistics necessarily focus upon treatment of the group, whereas in a disparate treatment case, the legal focus is upon treatment of the individual. Thus statistical data will often have no direct bearing on the ultimate issue of discriminatory intent in a particular decision to discharge, hire or promote. Limitations on the usefulness of statistics in these circumstances were recognized by this Court in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. at 805, n. 19, where the Court observed that general statistical determinations, "while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire."

Subsequent to *McDonnell-Douglas*, the appellate courts have held that proof of statistical imbalances, even if otherwise probative, is not determinative of the issue of discriminatory intent in an individual case. Regardless of statistics, "the issue remains in these cases whether a particular isolated historical event was discriminatory." *Ward* v. *Westland Plastics*, 651 F.2d 1266 (9th Cir. 1980). *Accord*, *Zahorik* v. *Cornell University*, 729 F.2d 85, 95 (2nd Cir. 1984); *Lamphere* v. *Brown University*, 685 F.2d 743, 749 (1st Cir. 1982); *Person* v. *J. S. Alberici Construction Co.*, 640 F.2d 916, 919 (8th Cir. 1981). The same principle has applied in disparate treatment cases under the ADEA. *Krieg* v. *Paul Revere Life Insurance Co.*, 718 F.2d 998

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the ADEA. *Kentroti* v. *Frontier Air Lines*, 585 F.2d 967 (10th Cir. 1978). *See also*, *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

(11th Cir. 1983); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 118 (3rd Cir.), *cert. denied*, 104 S.Ct. 348 (1983); *see also, Heward* v. *Western Electric Co., Inc.*, No. 83-2293, slip op. at 9-10 (10th Cir. July 3, 1984) (ADEA case noting that it is "well established that the use and significance of statistical evidence differs depending on whether the case alleges disparate treatment or disparate impact" and requiring "gross" disparities to establish a prima facie case in a disparate treatment class or pattern & practice suit).[9]

The instructions to the jury in the instant case were directly contrary to these decisions. As a result, the jury was permitted to give controlling weight to the statistical evidence, despite AT&T-TI's articulation of "an otherwise justifiable reason" for its promotion decisions with respect to each plaintiff. When considered in light of the trial court's failure to apply the *Hazelwood* standards either to admission of the statistical evidence or to its assessment by the jury, the instruction permitted an ultimate determination of discriminatory intent to be based on statistical evidence which did not satisfy minimum standards of probative value.

2. The Decision Below So Far Departed from the Usual and Accepted Course of Judicial Proceedings as to Justify This Court's Exercise of its Power of Supervision.

It has long been the rule of this Court that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish

[9] Individual disparate treatment cases have been distinguished from pattern and practice actions, in which the appellate courts have followed *Hazelwood* and *Teamsters* in concluding that purposeful discrimination may be shown by a sufficiently gross statistical disparity. *Peques* v. *Mississippi State Employment Service*, 699 F.2d 760 (5th Cir.), *cert. denied*, 104 S.Ct. 482 (1983); *Payne* v. *Travenol Laboratories*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Gay* v. *Waiters Union, Local 30, supra.*

ground for reversal unless it affirmatively appears that they were harmless." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919); *see also, McCandless* v. *United States*, 298 U.S. 342, 347-48 (1936) ("an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.")

The trial court's erroneous instruction, which resulted in contradictory instructions to the jury on the burden of proof, unquestionably relates "to the substantial rights of a party." The Tenth Circuit expressly so held in an opinion under the ADEA issued just two months before the decision in this case. *Perrell* v. *FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir. 1984). In *Perrell*, a jury instruction on the burden of proof under the ADEA was challenged. Finding that the instruction "did not clearly articulate the essence of the law" and that it could not "conclusively determine that the effect of the erroneous instruction was harmless," the court reversed the judgment below. 726 F.2d at 656, 657. In so doing, it articulated standards applicable to consideration of errors in instructions on the burden of proof under the ADEA:

> The standard of proof formulation is key to the understanding of liability under the ADEA. Thus, the erroneous instruction given in this case relates to the substantial rights of the defendant below. This error requires reversal unless this court can determine that the error was not prejudicial.

726 F.2d at 656-57.[10]

[10] In cases arising outside the ADEA, the courts of appeals have consistently held that errors in instructions on the burden of proof or material points of law are fundamental errors which require reversal. *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F.2d 1350, 1358 (Fed. Cir. 1984); *Connecticut Mutual Life In-*

A conclusion that the error below was not prejudicial cannot rest on an assumption that the jury applied the correct standard, either by disregarding a portion of the oral charge, or, as the trial judge in this case apparently anticipated, by reading the written instructions.

> When the correctness or adequacy of a jury instruction is at issue, an appellate court may not review the evidence in the light most favorable to the verdict winner. There can be no deference to a factual finding tainted by legal error. If the jury was misled as to the law on a material point, "we cannot presume that the jury applied the appropriate standard in deciding (an issue).

Connecticut Mutual Life Insurance Co. v. *Wyman,* 718 F.2d at 65. To cure an error in instructions, the correction must be "in clear and unmistakeable terms." *Baer Brothers Land & Cattle Co.* v. *Palmer,* 158 F.2d 278, 281 (10th Cir. 1946). Reliance on the jury's possession of written instructions is insufficient. *Jamison Co., Inc.* v. *Westvaco Corp.,* 526 F.2d 922 (5th Cir. 1976); *Haddigan* v. *Harkins,* 441 F.2d 844 (3rd Cir. 1970).

In this case the appellate court refused to consider and rectify an error affecting the substantial rights of the parties, properly preserved below and expressly raised on appeal.[11] This refusal was without explanation and is inconsistent with the decisions of this Court, the Tenth Circuit's own precedents, and the consistent practice of the

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surance Co. v. *Wyman,* 718 F.2d 63, 65 (3rd Cir. 1983); *McPhee* v. *Reichel,* 461 F.2d 947, 951 (3rd Cir. 1972).

[11] The failure of the court of appeals to consider the merits of the error in jury instructions presents no impediment to this Court's consideration of the issue, especially since the issue was "fully aired" below and "involves the application of settled legal principles to uncontroversial facts." *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 583, n. 24 (1979).

courts of appeals. Prompt and complete correction of erroneous instructions is prerequisite to a fair trial, particularly when the erroneous instructions relate to the burden of proof. The Tenth Circuit's unexplained departure from the normal procedure of considering and deciding claims of error affecting the substantial rights of the parties, combined with the crucial importance of accurate instructions on the burden of proof, merits the exercise of this Court's supervisory power to grant this petition and reverse the decision below. *New York Transit Authority* v. *Beazer, supra* note, at 15.

3. The Decision Below Raises Critical and Recurring Questions Concerning the Role of Judge and Jury in Employment Discrimination Cases.

AT&T-TI was grossly prejudiced by the unregulated admission of the plaintiffs' statistical evidence in this case. The issue is a broader one, however, that involves the interplay between the law of employment discrimination as it has developed in non-jury trials and the traditional role of the jury in assessing circumstantial evidence. Unwarranted deference to the jury's role will result, as in this case, in a jury's consideration of non-probative statistical evidence unenlightened by guidance or limiting instructions from the court. Not only is a "detailed scrutiny" required by the trial judge, it must be a scrutiny informed by the judicial standards which have developed for consideration of statistical evidence.

These standards should not differ depending upon whether the case is tried by a judge or a jury. Uniformity of decision-making is nowhere more important than in the application of federal statutes for the enforcement of civil rights. "The blind use of statistics cannot be permitted to

undermine the policies of Congress or erode our decisions on substantive law." *Proctor & Gamble Manufacturing Co.* v. *Fisher*, 449 U.S. 1115, 1118 (1981) (Rehnquist, J., dissenting from denial of writ of certiorari). Just as a defendant's rights should not be noticeably different depending upon the judicial circuit in which his case is heard, so should his rights not differ because a jury rather than a judge is the fact-finder.

These same considerations apply to the burden of proof. If the jury in the instant case followed the trial court's oral instructions by making an independent determination of the sufficiency of the defendant's stated reasons for its promotion selections, it could well have rendered a verdict for plaintiffs without consideration of the crucial "factual inquiry" of intentional discrimination. *See United States Postal Service Board of Governors* v. *Aikens, supra.* This is a particular danger because the jurors are unlikely to have appreciated the legal distinction between "legitimate reasons" sufficient to satisfy the defendant's burden of production and to create a jury issue, and "pretextual reasons" sufficient for the plaintiffs to carry their ultimate burden of proving liability. The effect of misreading the instruction was to generate confusion on the very point the instructions were intended to clarify.

This Court has been at pains to delineate in a series of cases the precise nature of the order and burden of proof applicable in employment discrimination cases tried under Title VII. *See, United States Postal Service Board of Governors* v. *Aikens, supra; Texas Department of Community Affairs* v. *Burdine, supra; Board of Trustees of Keene State Teachers College* v. *Sweeney*, 439 U.S. 24 (1978); *McDonnell-Douglas Corp.* v. *Green, supra.* When courts apply these same standards to jury trials under the ADEA, equal

if not greater scrutiny is required to insure that issues are submitted to juries pursuant to a correct formulation of the law.

Given the proliferation of jury trials in cases under the ADEA and 42 U.S.C. § 1981 which mimic Title VII in the nature and standards of proof, the issues raised by the decision below are significant and likely to recur. Guidance by this Court is necessary to insure consistency in the application of standards of proof in the federal courts.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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July 16, 1984

CERTIFICATE OF SERVICE

I, Christine H. Perdue, counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Petition for Writ of Certiorari and Appendix thereto in the United States Mail, first class postage prepaid, this 16th day of July, 1984, addressed to: Philip F. Horning, Esquire and James R. Moore, Esquire, Horning, Johnson & Grove, 1800 City National Bank Tower, Oklahoma City, Oklahoma 73102; and Howard K. Phillips, Clerk, United States Court of Appeals for the Tenth Circuit, Denver, Colorado 80294.

CHRISTINE H. PERDUE
Counsel for Petitioner

APPENDIX A

United States Court of Appeals
TENTH CIRCUIT

No. 80-1973

RAYMOND C. BLIM, MORRIS E. KINGHORN, J. F. VUKASOVIC, RALPH V. OLDHAM, STANLEY L. BOARTS, EUGENE FIRESTONE, WALLACE S. REPETTO, and LARRY N. STEWART,
Plaintiffs-Appellees,

v.

WESTERN ELECTRIC COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Oklahoma (D. C. Civil No. 78-0977-E)

Paul M. Thompson (Christine H. Perdue also of Hunton & Williams, Richmond, Virginia, and William D. Curlee of Lytle, Soule, Curlee, Harrington, Chandler & Van Dyke, Oklahoma City, Oklahoma, with him on the brief) for Defendant-Appellant.

James R. Moore and Philip F. Horning (Judson M. Fink with them on the brief) of Horning, Johnson & Grove, Oklahoma City, Oklahoma, for Plaintiffs-Appellees.

Before SETH, Chief Judge, BREITENSTEIN and LOGAN, Circuit Judges.

PER CURIAM. Filed April 3, 1984

Eight individual plaintiffs brought this action against Western Electric alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA). Prior to 1974 all eight plaintiffs were section chiefs at Western's Oklahoma City office. Due to a reduction in work force during 1974 and 1975 they were demoted to nonsupervisory positions. Beginning in October 1976, Western began to increase the number of section chiefs through promotions and repromotions of previously demoted supervisors. No plaintiff has been repromoted to section chief except Mr. Kinghorn who was repromoted on March 21, 1979. The plaintiffs claim that they were not repromoted because of age discrimination practiced by the defendant.

The jury found for the plaintiffs at trial. By special interrogatory the jury also found that the violations of ADEA were willful in each instance. The defendant made timely alternative motions for a new trial and judgment notwithstanding the verdict. The court denied both motions.

In a separate trial for damages the court entered a judgment for the plaintiffs in the amount of $901,440.78. This sum included back pay, front pay, a lump sum annuity for social security losses, damages for lost purchasing power on back wages, damages for losses due to payment of additional income taxes, and liquidated damages in an amount equal to each of the enumerated items of damages. Also, the trial court awarded $175,000 in attorney's fees.

The defendant appeals on numerous grounds, but we comment only on the primary issues, which are (1) whether the plaintiffs' evidence was properly admitted; (2) whether the evidence supported the verdict; and (3) whether the award of damages and attorney's fees was proper and reasonable.

The defendant claims that the trial court abused its dis-

cretion by admitting into evidence certain reports and testimony. The admission of evidence is discretionary with the trial court and will not be disturbed on appeal unless clearly erroneous. *Keen* v. *Detroit Diesel Allison,* 569 F.2d 547 (10th Cir. 1978). There is no indication in the record that the trial court abused its discretion in admitting the Moore Report, the Conover Report, the testimony of Gerald Hollingsworth, or the statistical data presented by the plaintiffs' expert.

The Moore Report is an internal Department of Labor document that memorialized a conversation between a DOL investigator, G. VanDiver Moore, and the Equal Opportunity Coordinator at Western Electric, Audrey Burns. The document concerned the possibility of reconciliation between the defendant and the plaintiffs. The court properly admitted the report pursuant to Federal Rules of Evidence 803(6) and 803(8). Audrey Burns testified about the conversation and carefully reviewed the document for the jury, outlining phrases, words, and attitudes with which she did not agree. There could be some serious doubt as to the admissibility of the Moore Report had it not been so fully tested and developed through the testimony of the witness Burns, the Equal Opportunity coordinator for Western Electric, who had provided much of the information. This presented to the jury the source of the information and its context. The trial court has the discretion of balancing the prejudicial effect with the probative value. *Texas Eastern Transmission* v. *Marine Office, Etc.,* 579 F.2d 561 (10th Cir. 1978). We find no abuse of discretion.

The Conover Report is a report prepared by the defendant concerning the average age of engineers in the company. The report considered age to be a factor in unit costs and productivity. The defendant claims that the evidence was

collateral and highly prejudicial. The report was admitted as evidence of an overall company policy of age discrimination. The court gave a limiting instruction to the jury advising them of the weight to be afforded to the report. The report was properly admitted. *See Texas Eastern Transmission* v. *Marine Office, Etc.*, 579 F.2d 561 (10th Cir. 1978), and *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977).

Gerald Hollingsworth was the affirmative action officer for the defendant during the time of the reduction in force and the alleged discrimination. He testified that the defendant's sister company, Southwestern Bell Telephone Company (SWB), was interested in hiring only younger white male section chiefs from Western. As a result of SWB's request, a number of younger employees were laterally transferred into SWB, and were therefore not demoted or terminated in the subsequent reduction in work force at Western. The defendant claims the evidence is irrelevant and highly prejudicial. The court denied the defendant's objection to the Hollingsworth testimony. The evidence was offered to show motive for the transfer and the protection of a particular group. We find no error.

The defendant also claims that plaintiffs' statistical evidence lacked a sufficient factual foundation. Both the plaintiffs and defendant presented statistical data to the jury for consideration. We find no basis for the assertion that it was error to admit the evidence. Both parties developed a reasonable basis in the evidence for their respective statistical studies. The data and the methods were tested on cross-examination. The objections of the appellant appear to be directed in large part to the weight to be given the studies. Whether the evidence supported the plaintiffs' statistical conclusions and what weight should be accorded to those

statistics are issues for the jury. *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975). Therefore, the trial court properly admitted the data.

The defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. In reviewing the evidence under prevailing standards in this circuit we find no error.

In this ADEA action the plaintiffs must make a prima facie showing that the defendant's failure to repromote them was due to unlawful age discrimination. Then the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence that the plaintiffs were not repromoted for a legitimate, nondiscriminatory reason. The plaintiffs then have the ultimate burden of persuasion by showing that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is merely a pretext. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Mistretta* v. *Sandia Corp.*, 649 F.2d 1383 (10th Cir. 1981). The standards were followed by the trial court and the trial court correctly instructed the jury.

The plaintiffs presented testimony, statistical data, and circumstantial evidence tending to prove the defendant's discriminatory conduct. The defendant provided statistical data and testimony from the plaintiffs' supervisors tending to prove that the plaintiffs lacked sufficient job performance records to be promoted. We must conclude that the jury, considering all the evidence and with all reasonable inferences, could properly find that the defendant failed to repromote the plaintiffs because of unlawful age discrimination. Therefore, the trial court properly denied the defendant's motion for a judgment NOV and motion for a new trial.

The defendant claims the trial court erred by awarding damages to the plaintiffs in the form of front pay, lost purchasing power, compensation for increased tax liability, an annuity for lost social security benefits, and liquidated damages.

The trial court awarded each plaintiff front pay from the date of judgment to the date of their respective projected dates of retirement. The amount equalled the difference between the salary being received at the time the judgment was entered and what each plaintiff would have made until the assumed retirement dates had they been repromoted. The plaintiffs originally requested the equitable remedy of repromotion to their desired section chief positions. However, at trial they indicated that they would prefer front pay damages over repromotion. Apparently all the plaintiffs except Mr. Kinghorn remain employed at Western Electric in nonsupervisory positions.

The district court has the equitable power to repromote the plaintiffs under the ADEA, 29 U.S.C. § 626(b). The trial court must exercise its discretion in awarding equitable remedies in light of the objectives of the statute being enforced. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944). The district court's decision not to order offers of reinstatement must be measured against the purposes of the ADEA. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The ADEA has a broad purpose of insuring that "older individuals who desire to work will not be denied employment opportunities solely on the basis of age." H.R. Rep. No. 950, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 504. Therefore, equitable remedies fashioned by the trial court which further the intent, purpose and language of the ADEA should be upheld.

In *EEOC* v. *Sandia Corp.*, 639 F.2d 600 (10th Cir.

1980), we found that the trial court did not abuse its discretion by ordering offers of reinstatement even though some plaintiffs previously stated that they would not accept reemployment with the defendant. We pointed out that reinstatement has the dual purpose of protecting the discharged employee and demonstrating the employer's good faith to the other employees. *EEOC* v. *Sandia Corp.*, 639 F.2d 600, 638 (10th Cir. 1980). Although preferences expressed by the parties may help the trial court fashion appropriate remedies, the determination of equitable remedies rests with the court. The court's judgment should be guided by sound legal principles. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975).

In *Albemarle* the Supreme Court pointed out that a district court may deny an equitable remedy permitted by a federal statute if it does not frustrate the central purpose of that statute. Since the trial court's decision must be examined in light of the statute's intent and purposes, the trial court should express its reasons for denying the equitable relief. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

The only reason stated by the trial court for not repromoting the plaintiffs was that they preferred damages. The court said:

> "The plaintiffs were ready, willing and able to serve as Section Chiefs on the dates of the first promotions and repromotions and have been so up to the present time, although each at trial expressed a preference for 'front pay' in lieu of reinstatement."

The ADEA enforcement section, 29 U.S.C. § 626(b), provides for both equitable and legal remedies.

Assuming, without deciding, that a court may award front pay under the ADEA, *compare Cancellier* v. *Fed-*

erated Department Stores, 672 F.2d 1312, 1319 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 131, *with Kolb* v. *Goldring, Inc.,* 694 F.2d 869, 874 n.4 (1st Cir. 1982), we conclude that the trial court erred in granting front pay in the instant case. Reinstatement is the preferred remedy under the ADEA. The focus of the congressional statement of purpose is on the continuing employment of older workers. *See* 29 U.S.C. § 621. Thus, reinstatement best serves Congress' purpose in enacting the ADEA. Furthermore, an award of front pay is always somewhat speculative. We therefore hold that courts should order reinstatement under the ADEA whenever it is an appropriate remedy.

In the instant case, the only reason that the trial court gave for awarding front pay rather than repromotion is that plaintiffs preferred damages. Standing alone plaintiffs' preference for damages clearly does not justify awarding front pay rather than reinstatement. Repromotion is particularly appropriate in the instant case. An atmosphere of hostility does not appear to exist between plaintiffs and defendant. All plaintiffs still work for defendant; all have been section chiefs, the position to which they would be repromoted. The Western Electric plant where plaintiffs work employs many section chiefs, and vacancies in that position are frequent. We hold that the trial court erred in granting front pay instead of reinstatement.

The trial court also erred in granting an award for lost purchasing power. Prejudgment interest and an award for lost purchasing power serve the same purpose, and if one is barred, the other should be barred as well. *Saunders* v. *Claytor,* 629 F.2d 596, 598 (9th Cir. 1980), *cert. denied,* 450 U.S. 980 (1981); *Blake* v. *Califano,* 626 F.2d 891, 895 (D.C. Cir. 1980).

In *Brooklyn Bank* v. *O'Neil,* 324 U.S. 697, 715 (1945),

the Supreme Court held that prejudgment interest was not available under the Fair Labor Standards Acts because liquidated damages, which at that time were mandatory under the FLSA[1], compensated plaintiffs for any delay. The ADEA incorporates 29 U.S.C. § 216(b), the FLSA provision for liquidated damages. Liquidated damages are available under the ADEA, however, only when there is a willful violation. 29 U.S.C. §626(b). The Ninth Circuit has held that liquidated damages under the ADEA are therefore punitive. *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981). In a later ADEA case the Ninth Circuit granted both prejudgment interest and liquidated damages. *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983). The court cited *Kelly* for the proposition that "liquidated damages and prejudgment interest serve different purposes in making ADEA plaintiffs whole." *Id.* at 556. We think that the legislative history undercuts that court's reasoning. The House Conference Report on the 1978 amendments to the ADEA states, "The ADEA . . . does not provide remedies of a punitive nature." H. Conf. Rep. No. 95-950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 535. Thus, we agree with the circuits that still regard *Brooklyn Bank* as pertinent and hold that prejudgment interest is not available under the ADEA if plaintiffs receive liquidated damages. *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982) (plaintiffs not entitled to both prejudgment interest and liquidated damages absent exceptional circumstances); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982). *See also Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 229 (7th Cir. 1972) (both prejudgment interest and liqui-

[1] A 1947 amendment to the FLSA makes liquidated damages discretionary in FLSA cases if the employer shows that he acted in good faith. *See* 29 U.S.C. § 260.

dated damages not available under the FLSA); *McClanahan* v. *Matthews,* 440 F.2d 320, 325-26 (6th Cir. 1971) (FLSA). Thus, the award for lost purchasing power was erroneous.

The district court also erred in awarding damages to plaintiffs for increased tax liability caused by the receipt of damages in a lump sum. The back pay[2] will be paid in a single year, reported in that year, and taxed at the rates then in effect. *See Driscoll* v. *Exxon Corp.,* 74-1 U.S.T.C. ¶ 9440 (S.D.N.Y. 1974); Rev. Rul. 78-336, 1978-2 C.B. 255. However, the tax laws contain five-year averaging provisions that will eliminate nearly all of any penalty that would otherwise result from receipt of a lump sum payment. *See* I.R.C. §§ 1301-05. We are unsure whether liquidated damages are taxable,[3] but if so the five-year averaging provisions would also apply to these sums. Because plaintiffs will suffer no significant tax penalty, the court's award for increased tax liability was improper.

The trial court also awarded plaintiffs damages for loss of Bell Systems Savings Plan and social security benefits. Fringe benefits are proper damages under the ADEA. H. Conf. Rep. No. 95-950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 535. On appeal defendant makes no argument that the award for the Bell Systems Savings Plan losses was improper. We cannot determine whether reinstatement will fully restore plaintiffs' social security entitlements. To the extent that repromotion will nc fully restore plaintiffs' entitlements to

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[2] Back pay is taxable to the plaintiffs and subject to income tax and social security withholding. *Freeman* v. *Blake Co.* 84 F. Supp. 700, 704 (D. Mass. 1949); Rev. Rul. 55-203, 1955-1 C.B. 114.

[3] Amounts paid for liquidated damages and attorney's fees are not remuneration for employment and thus not subject to tax withholding. Rev. Rul. 80-364, 1980-2 C.B. 294.

social security benefits, plaintiffs are entitled to compensation for their loss.

The ADEA relies on the Fair Labor Standards Act for computation of liquidated damages. *See* 29 U.S.C. § 216(b). That section provides:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Section 626(b) directs courts to substitute "amounts owing to a person" under the ADEA for "unpaid minimum wages" and "unpaid overtime compensation" when applying § 216(b) to calculate liquidated damages under the ADEA. The House Conference Report on the 1978 amendments to the ADEA states that liquidated damages are "calculated as an amount equal to the pecuniary loss" and cites "wages, fringes and other job related benefits" as examples of pecuniary loss. H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 535. Thus, the liquidated damages award should be equal to the award for back pay and loss of Bell Systems Savings Plan benefits, and any award for social security benefits that will not be restored by repromotion.

The defendant claims that the trial court erred in awarding attorney's fees of $175,000. The trial court's findings of fact and conclusions of law do not set out its rationale for the award. The Supreme Court and this Court have established the criteria for determining reasonable attorney's fees. *See Blum* v. *Stenson,* 52 U.S.L.W. 4377 (U.S. Mar. 21, 1984); *Hensley* v. *Eckerhart,* . . . U.S. . . ., 103 S. Ct. 1933 (1983); *Ramos* v. *Lamm,* 713 F.2d 546 (10th Cir.

1983). Since we have changed the award on appeal, the trial court should reexamine the matter of fees on remand.

The judgment is affirmed in part, reversed in part, and the case is remanded for further proceedings in accordance herewith.

80-1973—BLIM v. WESTERN ELECTRIC COMPANY, INC.

SETH, Chief Judge, concurring and dissenting:

I would decide the issue as to whether "front pay" is a permissible remedy under the Act as this is the basic issue presented on appeal. Front pay was awarded by the trial court, and I would hold that this was not a remedy contemplated by the ADEA. Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir.).

It must be recognized that the equitable jurisdiction of a federal court should be flexibly and broadly construed to afford complete relief in light of the statutory purposes. Mitchell v. DeMario Jewelry, 361 U.S. 288. However, such equitable powers cannot be used to expand or override the limited legal remedies available under the ADEA. The Congress very clearly distinguishes between the legal and equitable remedies available under the ADEA. *See* Lorillard v. Pons, 434 U.S. 575, 583. Allowing front pay runs against the intent of Congress in limiting legal remedies to "unpaid wages and unpaid overtime compensation." The court should not use its equitable powers to frustrate the intent of the statute. *See* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir.).

The legal remedies under the ADEA consist of "unpaid

minimum wages and unpaid overtime compensation," thus "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits." H.R. Rep. No. 950, 95th Cong., 2d Sess., *reprinted in* [1978] U. S. Code Cong. & Ad. News 504, 535.

Liquidated damages may be recovered when the violation is willful. Liquidated damages are designed to compensate the plaintiff for non-pecuniary losses or highly speculative pecuniary losses. Liquidated damages are a significant factor in this analysis of damages.

The front pay damages are too uncertain to be considered "lost wages" or "lost earned benefits." The possibilities of promotions, legitimate demotions, terminations, or death inject too many unknowns. In these circumstances the award of front pay is too speculative to be considered pecuniary damages under the statute. The enforcement section of the ADEA was specifically constructed to limit the type of available damages. As mentioned, although the statute grants broad equitable powers those powers cannot be used to expand the legal remedies specifically detailed in the statute.

It should be noted that this court has allowed "front pay" damages in some Title VII discrimination cases. *See* United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir.), and Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir.). Title VII is not the designated statutory model for damages under the ADEA. In light of the specific language of the ADEA and the FLSA it is not appropriate to analogize to Title VII for determination of damages. For a discussion of the difference between the ADEA and the FLSA *see* Lorillard v. Pons, 434 U.S. 575, 584.

I would not decide, as does the majority, that it was error to award front pay because reinstatement is the "preferred remedy." I do not agree that reinstatement should be or-

dered "whenever it is an appropriate remedy," as the majority states, if this means that such a remedy has some priority or is preferred, or there is some presumption. The Act does not create any such priorities and the matter is best left to the trial court with the usual standard of review. The trial courts are in a better position to decide whether reinstatement will accomplish the purposes of the Act. If there is a choice between "appropriate" remedies the trial court should make it. We do not know the status of the parties in the case before us at this late date nor their relationship with other employees and superiors.

I would thus decide the front pay issue presented to us on the law and the facts and not decide that something else is preferred.

As to attorney fees, the analysis and the proof would seem to be controlled by the Supreme Court's decision in Blum v. Stenson, ... U.S. ...., 52 U.S.L.W. 4377, which would seem to restrict a multiplication of factors to be considered.

APPENDIX B

United States District Court

WESTERN DISTRICT OF OKLAHOMA

No. CIV-78-0977-E

RAYMOND C. BLIM, MORRIS E. KINGHORN, J. F. VUKASOVIC, RALPH V. OLDHAM, STANLEY L. BOARTS, EUGENE FIRESTONE, WALLACE S. REPETTO, and LARRY N. STEWART,

Plaintiffs,

v.

WESTERN ELECTRIC CO., INC., a New York corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Philip F. Horning, James R. Moore and Linda King of Horning, Johnson & Grove, 1800 City National Bank Tower, Oklahoma City, OK 73102, for Plaintiffs.

William D. Curlee of Lytle, Soule & Emery, 2210 First National Center, Oklahoma City, OK 73102, for Defendant.

Before LUTHER B. EUBANKS, United States District Judge.

BACKGROUND

The above entitled case was bifurcated and the liability portion came on for trial on March 3, 1980, through March 11, 1980, and was tried to the court and jury, with Philip F. Horning and James R. Moore appearing as attorneys for plaintiffs, and William D. Curlee appearing as attorney for defendant. The jury found the defendant liable to all plaintiffs for age discrimination in its verdict of March 11, 1980, for failure to repromote plaintiffs to Section Chief. By special interrogatory, the jury also found said discrimination willful as to each plaintiff.

On August 13, 1980, through August 15, 1980, the damages portion of the case was tried to the court, with the same counsel appearing for the same parties. On August 29, 1980, further evidence was heard with respect to the pension benefits issue and also with respect to attorney fees, and further arguments were heard on several legal issues. After hearing and considering all the evidence of the parties, all of the legal authorities submitted, and being fully advised herein, the court now makes the following findings of fact and conclusions of law with regard to the damages owed by defendant to plaintiffs.

FINDINGS OF FACT

1. At the time of the damages portion of the trial, each plaintiff's age, years with the company, time in grade as a Section Chief prior to demotion, date of demotion from Section Chief, and percent of control (relating to salary) at demotion, was as follows:

A. RAYMOND C. BLIM, age fifty-five (55), fifteen (15) years as a Section Chief, thirty-two (32) years with the

company, demoted April 28, 1975, percent of control 102.25.

B. MORRIS E. KINGHORN, age fifty-four (54), seventeen (17) years as a Section Chief, thirty (30) years with the company, demoted April 15, 1975, percent of control 105.56.

C. J. F. VUKASOVIC, age fifty-seven (57), fifteen (15) years as a Section Chief, thirty-nine (39) years with the company, demoted April 15, 1975, percent of control 107.64.

D. RALPH V. OLDHAM, age sixty-one (61), five (5) years as a Section Chief, twenty-nine (29) years with the company, demoted April 28, 1975, percent of control 102.15.

E. STANLEY L. BOARTS, age fifty-nine (59), thirteen (13) years as a Section Chief, twenty (20) years with the company, demoted April 28, 1975, percent of control 103.33.

F. EUGENE FIRESTONE, age sixty-one (61), nine (9) years as a Section Chief, thirty-four (34) years with the company, demoted June 1, 1974, percent of control 104.71.

G. WALLACE E. REPETTO, age fifty-seven (57), five (5) years as a Section Chief, thirty-four (34) years with the company, demoted April 1, 1975, percent of control 99.5.

None of the plaintiffs were ever repromoted to Section Chief except MORRIS E. KINGHORN, who was repromoted on March 21, 1979, after the commencement of this action, with his percent of control lowered to 90 percent.

2. Each plaintiff is presently eligible to retire without penalty from the defendant company with the exception of plaintiff BOARTS, who will be so eligible in October 1980. The planned retirement date of each plaintiff is as follows:

A. Plaintiff BLIM, August 26, 1981.
B. Plaintiff KINGHORN, February 16, 1988.
C. Plaintiff VUKASOVIC, April 15, 1981.
D. Plaintiff OLDHAM, March 10, 1981.
E. Plaintiff BOARTS, March 31, 1981.
F. Plaintiff FIRESTONE, March 1, 1981.
G. Plaintiff REPETTO, June 12, 1981.

3. After the demotions of plaintiffs and others, the defendant company began promotions and repromotions to the level of Section Chief on October 11, 1976, when it promoted seven (7) employees to Section Chief who had never held that position previously. Their ages were thirty-four (34), thirty-four (34), thirty (30), thirty (30), thirty-eight (38), twenty-nine (29) and thirty (30)—all younger than KINGHORN, the youngest plaintiff. On that same day, defendant repromoted five (5) employees who had previously held the position of Section Chief, four (4) of whom were younger than KINGHORN.

4. On December 20, 1976, defendant made its next series of promotions and repromotions to Section Chief when it promoted six (6) employees who had never held that position previously. Their ages were thirty-four (34), thirty-eight (38), forty-three (43), forty-one (41), twenty-nine (29) and thirty-six (36)—all younger than KINGHORN. On that same day, defendant repromoted two (2) employees who had previously been a Section Chief, one (1) of whom was younger than KINGHORN.

5. The plaintiffs were ready, willing and able to serve as Section Chiefs on the dates of the first promotions and repromotions and have been so up to the present time, although each at trial expressed a preference for "front pay" in lieu of reinstatement.

6. The willful discrimination found by the jury commenced against plaintiffs on October 11, 1976, and said date should be used as the "start date" for lost back wages suffered by the plaintiffs. In calculating lost wages for the plaintiffs, the percent of control element in the wage calculation should be that percent of control assigned to each plaintiff at the time of his demotion. The parties have agreed as to the point value per job and base constant elements of the wage calculation for the plaintiffs.

7. Due to the willful age discrimination of the defendant company, each of the plaintiffs has suffered lost back wages, lost "front wages," lost contributions and earnings on the Bell Systems Savings Plan, lost social security benefits, lost purchasing power on back wages, and loss in the form of additional income taxes which will be paid upon the damage award herein due to the bunching of said damages in the form of income into one taxable period. Said damages are set out specifically in No. 9 herein.

8. That in addition to the foregoing, the plaintiffs should be restored to their rightful place with respect to pension rights with the defendant company, and in this regard it has been offered by the defendant that in the event this judgment is finally upheld the company volunteers to and urges this court to allow each plaintiff such pension, if and when he becomes entitled to start receiving one, as he would have been awarded had he been restored to the position of Section Chief on October 11, 1976, at the percent of control held by each plaintiff at the time of his original demotion, and continued in such capacity to the date he became eligible to start receiving a pension. The court believes that this remedy is superior to and more accurate than any monetary award could possibly be and therefore will direct that no lump sum award be made for loss of pension benefits but

that the agreement of the company to make pension payments as aforesaid be formally ordered.

9. Each plaintiff has suffered damages in the categories set out as follows:

Raymond C. Blim

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 20,829.12	$ 5,207.28
Lost Wages, from 8/13/80 (without allowance for inflation)	6,133.03	1,533.26
Loss of participation in Bell System Savings Plan	859.11	214.78
Loss of Social Security Benefits ...	2,653.46	1,220.59
Loss of purchasing power	$ 4,559.86	$ 1,139.97
		9,315.88
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	9,315.88	
	44,350.46	
Liquidated damages	44,350.46	
TOTAL	$ 88,700.92	

Stanley L. Boarts

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 33,876.66	$ 8,469.17
Lost Wages, from 8/13/80 (without allowance for inflation)	6,115.84	1,528.96
Loss of participation in Bell System Savings Plan	1,319.00	329.75
Loss of Social Security Benefits ...	2,230.05	1,025.82
Loss of purchasing power	7,224.44	1,806.11
		13,159.81

	Amount	*Income Tax Effect*
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	13,159.81	
	63,925.80	
Liquidated damages	63,925.80	
TOTAL	$127,851.60	

Eugene Firestone

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 28,699.65	$ 7,174.91
Lost Wages, from 8/13/80 (without allowance for inflation)	4,287.35	1,071.84
Loss of participation in Bell System Savings Plan	1,062.26	265.57
Loss of Social Security Benefits ...	641.25	294.98
Loss of purchasing power	6,242.97	1,560.74
		10,368.04
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	10,368.04	
	51,301.52	
Liquidated damages	51,301.52	
TOTAL	$102,603.04	

Joseph F. Vukasovic

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 29,721.32	$ 7,430.33
Lost Wages, from 8/13/80 (without allowance for inflation)	5,986.03	1,496.51

	Amount	*Income Tax Effect*
Loss of participation in Bell Systems Savings Plan	1,217.13	304.28
Loss of Social Security Benefits	1,547.91	712.04
Loss of purchasing power	6,309.02	1,577.26
		11,520.42
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	11,520.42	
	56,301.83	
Liquidated damages	56,301.83	
TOTAL	$112,603.66	

Morris E. Kinghorn

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 20,830.20	$ 5,207.55
Lost Wages, from 8/13/80 (without allowance for inflation)	20,091.41	5,022.85
Loss of participation in Bell Systems Savings Plan	1,540.11	384.53
Loss of purchasing power	5,313.99	1,328.50
		11,943.43
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	11,943.43	
	$ 59,719.14	
Liquidated damages	59,719.14	
TOTAL	$119,438.28	

Ralph F. Oldham

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 18,568.81	$ 4,642.20
Lost Wages, from 8/13/80 (without allowance for inflation)	3,298.32	824.58
Loss of participation in Bell System Savings Plan	716.30	179.08
Loss of purchasing power	3,965.73	991.43
		6,637.29
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	6,637.29	
	33,186.45	
Liquidated damages	33,186.45	
TOTAL	$ 66,372.90	

Wallace S. Repetto

	Amount	*Income Tax Effect*
Lost Wages, until 8/13/80	$ 27,715.44	$ 6,928.86
Lost Wages, from 8/13/80 (without allowance for inflation)	8,603.06	2,150.77
Loss of participation in Bell System Savings Plan	974.61	243.65
Loss of purchasing power	6,255.04	1,563.76
		10,887.04
Income taxes, in addition to those payable, if amounts had been received in the normal course of business	10,887.04	
	54,435.19	
Liquidated damages	54,435.19	
TOTAL	$108,870.38	

10. The damage amounts reflected above for social security losses are measured by the costs of annuities which would provide the plaintiffs monthly benefits equal to the difference between social security benefits they should have received upon their retirement absent any discrimination and social security benefits they will actually receive. These "costs of annuities" discount to present day value the social security losses taking into consideration mortality and interest earnable and they contemplate the exhaustion of the award at the end of plaintiffs' expected life spans. They are therefore a proper measure of damages.

11. Each plaintiff is entitled to liquidated damages in an amount equal to the pecuniary damages set out in No. 9 herein:

A. Back Pay;
B. Front Pay, without any allowance for inflation;
C. Loss of Bell System Savings Plan Benefits;
D. Lost Social Security Benefits;
E. Lost purchasing power; and
F. Additional income taxes.

12. Plaintiffs are also entitled to recover from defendant reasonable attorney fees and costs for the prosecution of this action and this court finds that a fair and reasonable attorney's fee is One Hundred Seventy-Five Thousand Dollars ($175,000.00).

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and the subject matter of this action under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621, et seq. Venue is proper herein.

2. The court concludes that plaintiffs are entitled to re-

cover lost back pay in the amounts shown above. *Loeb* v. *Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); *Marshall* v. *Arlene Knitwear, Inc.,* 454 F.Supp. 715 (E.D.N.Y. 1978); *Buchholz* v. *Symons Mfg. Co.,* 445 F.Supp. 706 (E.D. Wis. 1978), and *Rogers* v. *Exxon Research & Engineering Co.,* 404 F.Supp. 324 (D. N.J. 1975), reversed on other grounds, 550 F.2d 834 (3d Cir. 1977).

3. The court concludes that the plaintiffs are entitled to recover lost Bell Systems Savings Plan benefits as shown above. *Mistretta* v. *Sandia Corp.,* [18 EPD ¶ 8852] (D.C. N.M. 1978).

4. The court concludes that the plaintiffs are entitled to recover lost social security benefits in the amounts shown above. *Mistretta* v. *Sandia Corp., supra,* and *Buchholz* v. *Symons Mfg. Co., supra.*

5. The court concludes that the plaintiffs are entitled to recover their loss in purchasing power on their back wages due to the non-speculative and mathematically exact impact of inflation in the amounts shown above. *Steckler* v. *United States,* 549 F.2d 1372 (10th Cir. 1977), *DeWeese* v. *United States,* 419 F.Supp. 170 (D. Colo. 1976), aff'd, 576 F.2d 802 (10th Cir. 1978), and *Rowe* v. *Revlett,* Nos. 76-1097-98 (10th Cir., Aug. 22, 1977).

6. The court concludes that the plaintiffs are entitled to recover tax loss due to the bunching of their award for back compensation into one taxable period in the amounts shown above. *DeWeese* v. *United States, supra;* and *United States* v. *Sommers,* 351 F.2d 354 (10th Cir. 1965).

7. The court concludes that the plaintiffs are entitled to recover in lieu of reinstatement, "front wages" in the amounts shown above. *Loeb* v. *Textron, Inc., supra; Hill* v. *Western Electric,* 19 FEP Cases 490 (4th Cir. 1979); and

Fitzgerald v. *Sirloin Stockade, Inc.*, No. CIV-77-0467-E (W.D. Okla.).

8. The court concludes that the plaintiffs are not entitled to recover prejudgment interest on their lost back wages. *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697 (1945).

9. The court concludes that the plaintiffs are entitled to recover liquidated damages due to defendant's willful discrimination under the ADEA in an amount equal to the damages they recover for lost back wages, front pay, loss of Bell Systems Savings Plan contributions, loss of social security benefits, loss of purchasing power, and loss of additional taxes due to the bunched income affect. *Lorillard* v. *Pons*, 434 U.S. 575, 98 Sup.Ct. 886, 55 L.Ed.2d 40 (1978); *Loeb* v. *Textron, Inc., supra; Wehr* v. *Burroughs Corp.*, 22 FEP Cases 994 (3d Cir. 1980); and *Fellows* v. *Medford Corp.*, 431 F.Supp. 199 (D. Ore. 1977).

10. The court concludes that the plaintiffs are entitled to recover their reasonable attorney's fees and costs in the prosecution of this action. A reasonable fee is found to be $175,000.00.

11. Prior to this date the court orally advised counsel for all parties what its decision would be on the contested issues raised in the damage feature of this trial, and counsel agreed to compute the dollar amounts due and attempt to prepare an agreed judgment reflecting said amounts. This has now been done and an Order of Judgment approved by both counsel has been presented to the court and is being entered of even date herewith.

DATED this 5th day of September, 1980.

United States District Judge

APPENDIX C

United States Court of Appeals

TENTH CIRCUIT

MARCH TERM—MAY 8, 1984

No. 80-1973

RAYMOND C. BLIM, MORRIS E. KINGHORN, J. F. VUKASOVIC, RALPH V. OLDHAM, STANLEY L. BOARTS, EUGENE FIRESTONE, WALLACE S. REPETTO and LARRY N. STEWART,

Plaintiffs-Appellees,

v.

WESTERN ELECTRIC, INC., a New York Corporation,

Defendant-Appellant.

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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This matter comes on for consideration of:

A. Appellees' petition for rehearing filed April 17, 1984;

B. Appellant's petition for rehearing with suggestion for rehearing en banc filed April 17, 1984.

Upon consideration whereof, it is ordered:

1. The appellees' petition for rehearing is denied.

2. The appellant's petition for rehearing is denied by the

panel that rendered the decision sought to be reheard. The petition for rehearing having been denied by the panel that rendered the decision sought to be reheard, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

3. Appellant complains that the Court never acted on a motion to supplement the record and correct the appendix. The motion to supplement and correct is denied by the panel that rendered the decision in this appeal.

4. Appellant's petition for rehearing informs the Court that several of the plaintiffs have retired and, hence, cannot be promoted. It is implicit in our decision that back pay and other appropriate damages would be paid for the period prior to repromotion; for those plaintiffs who have retired, this would mean that they should be paid damages for the period prior to the retirement. Those claims should be presented to the District Court on remand.

This order shall be included in the mandate to be issued to the trial court.

HOWARD K. PHILLIPS, Clerk